

PUBLIC CONTRACTS REVIEW BOARD

Case 1663 – SNTLC/06/2021 – Works – Tender for the repaving and embellishment of Pjazza Santa Margerita, Ta' Sannat

10th December 2021

The Board,

Having noted the letter of objection filed by Dr Joshua Grech acting for and on behalf of Mr Richard Cauchi, (hereinafter referred to as the appellant) filed on the 25th October 2021;

Having also noted the letter of reply filed by Dr Larry Formosa on behalf of Cosyra Legal acting for and on behalf of Sannat Local Council (hereinafter referred to as the Contracting Authority) filed on the 3rd November 2021;

Having heard and evaluated the testimony of the witnesses Ing Christian Cordina (Technical Expert of the Contracting Authority) as summoned by Dr Joshua Grech acting for Mr Richard Cauchi;

Having heard and evaluated the testimony of the witnesses Mr Clayton Tewma (Chairman of the Evaluation Committee) as summoned by Dr Joshua Grech acting for Mr Richard Cauchi;

Having heard and evaluated the testimony of the witnesses Perit Brian Curmi (Member of the Evaluation Committee) as summoned by Dr Joshua Grech acting for Mr Richard Cauchi;

Having heard and evaluated the testimony of the witnesses Ing Jeffrey Muscat (Member of the Evaluation Committee) as summoned by Dr Joshua Grech acting for Mr Richard Cauchi;

Having heard and evaluated the testimony of the witnesses Perit Edward Scerri (Technical Expert of the Contracting Authority) as summoned by Dr Joshua Grech acting for Mr Richard Cauchi;

Having heard and evaluated the testimony of the witnesses Mr Richard Cauchi (the Appellant) as summoned by Dr Joshua Grech acting for Mr Richard Cauchi;

Having heard and evaluated the testimony of the witnesses Mr William Sultana (representative of the Contracting Authority) as summoned by Dr Larry Formosa acting for Sannat Local Council;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 2nd December 2021 hereunder-reproduced;

Minutes

Case 1663–SNTLC06/2021. Tender for the Repaving and Embellishment of Pjazza Santa Margerita, Sannat

The tender was published on the 18th May 2021 and the closing date was the 18th June 2021. The value of the tender excluding VAT was € 2,889,525. The tender was awarded on the 16th September 2021.

On the 25th October 2021 Mr Richard Cauchi filed an appeal against the Sannat Local Council as the Contracting Authority objecting to his disqualification on the grounds that after being awarded and accepting the tender he was advised that the award was being cancelled as the economic or technical parameters of the tender had been fundamentally altered.

A deposit of € 14,500 was paid.

There were five (5) bidders.

On 2nd December 2021 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Mr Lawrence Ancilleri as members convened a public virtual hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Mr Richard Cauchi

Dr Joshua Grech Legal Representative

Contracting Authority – Sannat Local Council

Dr Larry Formosa	Legal Representative
Mr Clayton Tewma	Chairperson Evaluation Committee
Arch Brian Curmi	Member Evaluation Committee
Eng Jeffrey Muscat	Member Evaluation Committee
Dr Mario Calleja	Member Evaluation Committee
Mr William Sultana	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations.

Dr Joshua Grech Legal Representative for Mr Richard Cauchi said that this appeal was unusual as it deal with a post award of a tender and he would be requesting the testimony of members of the Evaluation Committee and confirmation of the date of the award.

Dr Larry Formosa Legal Representative for the Sannat Local Council referred to the letter of reply and the points and reasons for cancellation of the tender. The objection on the basis of the original notification of cancellation (5th October) was '*fouri termini*' and was not appealable.

Dr Grech replied that it was not logical to appeal on the cancellation of an award where no details were supplied – the only possible appeal was on the 16th October letter which was an appeal on a tender already awarded.

Dr Formosa insisted that the appeal was on both letters while Dr Grech insisted that his client was appealing only on the 16th October letter.

After a short recess the Chairman said that the appeal should be heard since the 5th October letter is invalid due to not indicating an addressee and the reasons for the cancellation. The October 16th appeal follows the correct procedure and was in time.

Engineer Christian Cordina (34391G) called as a witness by Appellant testified on oath that he was the engineer engaged by the Sannat Council to review the evaluation. He was a mechanical engineer not an electrical one. In the first or second week of November having been engaged to check the submissions by Mr Cauchi he found three anomalies with the light fittings proposed. His comments were passed to the Council on the 30th November.

Questioned by Dr Formosa witness stated that he was approached by the Council earlier than November. He would be submitting a copy of his report to the Board. From research carried out he was not able to trace luminaires with the specifications required. None of the bidders met these requirements.

Questioned by the Chairman witness said that the date of his report should be read 1st December 2021.

At this stage Dr Formosa requested the appointment of a technical expert, according to S.L. Regulation 90 to evaluate Engineer Cordina's conclusions.

Dr Grech objected as the object of the appeal is not on a technical evaluation but on a cancellation of the tender after award.

The Chairman directed that there was no need to appoint an expert as the Evaluation Committee's personnel were qualified enough to evaluate this tender. Data mentioned so far gives no reasons to doubt them.

Dr Formosa insisted that apart from the issues of the cancellation of the call and of the award there was also the issue of the luminaires.

Dr Grech said that that statement was totally incorrect as the offer was accepted in full and the luminaires were available and accepted by the Council.

The Chairman pointed out that the basis of the cancellation was not just on the luminaires and still had to be submitted.

Mr Clayton Tewma (2596G) called as a witness by Appellant testified on oath that he was the Chairperson of the Evaluation Committee and a local councillor. He was not qualified to answer technical questions.

Architect Brian Curmi (462191M) called as a witness by Appellant testified on oath that he was one of the evaluators. He detailed the evaluation process which had run to five or six meetings and the conclusion was to award the tender to Mr Cauchi. He could not remember the exact dates of the meetings. The luminaires offered were not exactly as requested but similar to those offered by other bidders. The conclusion was in favour of awarding the tender to Mr Cauchi and after that he had no further communications with the Council except for one meeting.

Questioned by Dr Formosa witness stated that the Gantt chart showed 94 weeks instead of 78. However at a meeting with the Council Mr Cauchi indicated that he could easily stick to 78 weeks because of the way the hours had been calculated. The Council had a concession that the Gantt chart

could be updated and confirmed by bidder once the tender was awarded. Witness agreed that this was a Note 3 matter.

Engineer Jeffrey Muscat (512594M) called as a witness by Appellant testified on oath that he is an electrical engineer and was one of the evaluators dealing mainly with the lighting section of the tender. He confirmed that the Committee's decision was to award the tender to Mr Cauchi whose offer was technically compliant. According to the tender the Gantt chart can be updated (see para 15.1) On first evaluation the technical offer form indicated 94 weeks but bidder indicated that completion would be in 78 weeks - if the chart was worked on a six day week the time would actually work out at 78 weeks. This was confirmed in a clarification.

Questioned by Dr Formosa witness stated that the evaluators did not check if electrical item IP68 was available as its specification did not make sense as the item would not be sitting in water. He agreed that bidder offered item IK8 instead of IK10 but bidder subsequently confirmed compliance in the details supplied in a clarification. Mr Cauchi submitted a tender which complied except on one point.

Questioned by Dr Grech witness said that the literature was rectifiable whilst in reply to a question from the Chairman he stated that the difference in IK fittings rating does not make any difference to the award.

Architect Edward Scerri (2272G) called as a witness by Appellant testified on oath that he was acting as advisor Architect to the Sannat Local Council. He had designed the project and was involved in the call for tenders and getting planning approval, but was not interested in the mechanical or electrical side of the tender. After the award of the tender he was requested by the Heritage Superintendent to consider if the type of materials being used were suitable but does not recall the date of this request. This intervention had the effect of delaying the tender as it was uncertain whether the materials would be approved. The Council were subsequently notified of this following an earlier conversation.

Questioned by Dr Formosa witness stated that the Gantt chart was based on approval of the summary application – the main change being not in the chart but in materials. A possible change of materials would again likely lead to a change in execution. Witness agreed that because of the likely change of materials it would make sense to split the tender.

In reply to questions from Dr Grech witness stated that at first it was his view that the tender should not be split but he changed his advice when problems arose. He agreed that the change of tiles for the church parvis would affect longer time lines but all these things were proposed after the tender had been awarded.

Further questioned by Dr Formosa witness simply stated that change of materials equals change of costs.

Mr Richard Cauchi (397092M) called as a witness by Appellant explained on oath the process followed in submitting his bid and that he had supplied the Council with the necessary compliance certificates when accepting their award of the contract. After clarification he had confirmed that the Gantt chart indicated completion in 78 weeks. The IP delivered in lieu of IP68 did not matter as the item would not be resting in the water – he had stuck to the tender terms with minute changes that did not make a difference to the offer.

Questioned by Dr Formosa witness stated that the actual contract was not signed. He agreed that he had offered IP67 instead of IP68 but had just given a reason for this, whilst the Council had not indicated that they had any problems with being offered IK8 instead of IK10 light fittings or indeed that they were not acceptable. Originally the Council did not give a reason for the cancellation.

Replying to a question from Dr Grech witness stated that the confirmation of the award of the contract to him was published on the ePPS to which Dr Formosa suggested that a contract was only valid when it was signed.

Mr William Sultana (229699M) called as a witness by the Contracting Authority testified on oath that he was part of the team that drafted the tender technical specifications and the publishing of the tender. After the award the Council were advised that certain items were not available on the market and problems arose regarding the parvis tiles and therefore it was decided to break the tender into three parts – lights, parvis tiles and tiles for the square. This will obviously affect completion and a variation in prices.

Dr Grech questioned witness how it was that in October the Council already knew that the report of Engineer Cordina which was delivered in December would state that the lighting was not to specification. Witness replied that Engineer Cordina gave his report on the 1st December 2021.

This concluded the testimony of the witnesses.

Dr Grech said that it was incongruous that even between themselves the witnesses could not agree. The Engineer engaged presented his report on the 1st December. Yet testimonies have been heard that the tender as submitted by Appellant was compliant and there was no reason to cancel it. What has been given in testimony is outside the merit of this appeal and one asks if the Council can cancel a tender at the stage it has reached and after acceptance by the bidder. A Contracting Authority is entitled to cancel a tender but not an award. Reference was made to Court of Appeal Case 1/2019 which held that if the Appellant has met all stages and accepted the award then there is a binding contract – the notification is precisely that and once accepted becomes a contract. There is no consistency on the part of the Council – first they claim some things not clear then they cancel the award as not compliant. The letter from the Superintendent of Cultural Heritage is dated a week after the withdrawal of the award.

Referring to the General Rules Governing Tenders Dr Galea said that Regulation 18.3 states that change of parameters allows cancellation of a tender; however Regulation 20.1 imposes an obligation on the tenderer to accept the award within two working days. This makes it clear that the receipt of the award is a contract otherwise the bidder is penalised. The Authority cannot break these regulations and the tender and award must stand with the deposit being properly refunded.

Dr Formosa stated that all the factors point to cancellation being the ideal solution. The bidder does not have a right to decide what to submit in the technical requirements. Witnesses have confirmed that there are discrepancies. Both Engineers Muscat and Cordina agreed that the requested luminaires are not available on the market which means some potential bidders may have been excluded pointing to unfair competition. Appellant was not compliant in the Gantt chart submitted and the technical specifications. General Rule 20.6 says that only a signed contract is a commitment and therefore a decision could be reversed. The letter of the 5th October should stand since bidder had consulted his lawyer about it. The Local Council had problems with Cultural Heritage and the Planning Department regarding the materials for the parvis which complicates the execution of this contract and since the economic parameters have changed cancellation is merited. In PCRB Case 1581 it was held that a tender is not compliant unless the specifications are fully met whilst in the Yama Yami Case an indication was given as to when a tender might be cancelled. The dates of the reports were only indicative and could have been earlier. There are valid reasons for the cancellation of this call.

Dr Grech said that in regard to the luminaires the Board will no doubt take note of the report of the Engineers. This appeal is not based on the 5th October letter and the Board has already ruled so. In the

Munxar Case (1581) the contractor was allowed to provide better materials whilst the Yama Yami Case concerned a police conduct requirement. Regulations 20.6 should be read in context with the other sections of the Regulations – nowhere do those Regulations allow cancellation of an award.

Dr Formosa concluded by saying that Engineer Curmi said that the luminaires were not compliant.

The Chairman thanked the parties for the submissions and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 2nd December 2021.

Having noted the objection filed by Mr Richard Cauchi (hereinafter referred to as the Appellant) on 25th October 2021, refers to the claims made by the same Appellant with regards to the tender of reference SNTLC/06/2021 listed as case No. 1663 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Joshua Grech

Appearing for the Contracting Authority: Dr Larry Formosa

Whereby, the Appellant contends that:

a) Facts –

- i. On the 16th September, 2021, the objector had been notified by Ta' Sannat Local Council that:

“The procurement was recommended for award to Richard Cauchi - 000156860 for the amount of €2,178,895,20 excluding VAT this being the cheapest priced offer satisfying the administrative and technical criteria”

- ii. The period of appeal being 10 calendar days from receipt of the mentioned letter through EPPS had elapsed, and no appeals had been filed and therefore, the decision of the contracting authority - Ta' Sannat Local Council - was deemed to be final.
- iii. Immediately following the lapse of the appeal period, the tenderer accepted the award via the online platform and submitted the relative VAT and IRD compliance certificates from the Commissioner for Inland Revenue including for the sub-contractors.

- iv. By virtue of a letter dated 5th October, 2021, the appellant was notified that:
"It is being advised that the Award of this tender is being cancelled. A fresh notification shall be issued in due course." to which communication, the tenderer objected formally to such notification by virtue of a letter dated the 8th October, 2021;
- v. Finally, by virtue of a letter dated 16th October, 2021, a cancellation notice was notified to the appellant, informing him that: *"the procurement process for the tender in caption is being cancelled. A fresh call shall be issued in due course. The tender is being cancelled namely for the following reason; The economic or technical parameters of the project have been fundamentally altered."*
- b) The economic and technical parameters were established before the issue of the tender with full details having been specified in the most ample and accurate manner in the tender document. The appellant has offered and based his tender based on these specifications and which were duly accepted by the evaluation committee, hence the issue of the award.
- c) The evaluation committee is bound by these regulations and cannot act outside these terms. Furthermore, it is not possible for the Contracting Authority to cancel the award of the tender, given that upon the point that the Contracting Authority duly notified the appellant of its decision to award the tender to the appellant and the appellant duly accepting the award, this communication and acceptance constituted an agreement, a contract and thus a binding relationship between the appellant and the Contracting Authority.
- d) The mentioned reason for the cancellation of the award has been taken abusively and without any legal basis. The Contracting Authority whilst mentioning the alteration of economic or technical parameters stops short from indicating on the basis of which rule or regulation the mentioned decision is being taken. It should be pointed out that the General Rules of the Tender together with the same tender document, does not mention any possibility whatsoever for the cancellation of the award;

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 3rd November 2021 and its verbal submission during the virtual hearing held on 2nd December 2021, in that:

- a) Facts –
 - i. On the 16th September 2021, following this recommendation of the Evaluation Board the Ta' Samnat Local Council notified all bidders that the preferred bid was that of the Objector.
 - ii. That after a couple of days from this date it was drawn to the attention of the Ta' Sannat Local Council that the Objector's submission was non-compliant and that the Evaluation Committee grossly erred in its recommendation since the latter had requested and given the opportunity to the preferred bidder to rectify its submission despite such rectifications falling within "Note 3" and thus no rectifications were allowed. The Objector/ Preferred

- Bidder had originally submitted a Gantt Chart which did not conform to the tender requirements since the Objector had declared that all works were to be completed within a period of ninety four (94) weeks and this when the tender document specifically requested that such works were to be completed within seventy eight (78) weeks.
- iii. In view of this, the Local Council proceeded to ask the Department of Contracts for its advice on the matter.
 - iv. The Department of Contracts responded to the Council's request by advising that the Call had to be either re-evaluated or cancelled.
 - v. In view of the above, on the 5th October 2021 the Local Council notified the Objector that the Award of this tender was being cancelled.
 - vi. That the Objector did not appeal from this decision in terms of the Public Procurement Regulations and thus this decision is final.
 - vii. Furthermore, it also transpired that none of the bidders had actually met the specifications requested in the Tender Document in relation to the luminaries (sic). It appears that the luminaries(sic) which were requested were not available on the market. The Council was advised to change this requirement in order to allow for more competitive submissions and prices.
 - viii. That during this time the Local Council was also advised by the Superintendence of Cultural Heritage that the material requested in the Tender Document for the paving of the parvis was not suitable.
- b) At the outset the Contracting Authority contends that the decision of the Contracting(sic) Authority to cancel the Award is final since this was communicated to the Objector on the 5th October 2021 and no Objection in terms of the Public Procurement Regulations was filed by the same Objector against this decision.
 - c) The Local Council is also flabbergasted by the Objection of the Mr. Richard Cauchi since if it were to re-evaluate the tenders, Mr. Cauchi's bid would have been found to be technically non-compliant since both the Gantt chart and Luminaries'(sic) specifications submitted did not conform with the Council's request.
 - d) The Contracting Authority submits that the decision to cancel the said Tender stems from the fact that in this particular case the Contracting Authority was compelled to change the parameters of the project since as stated above, the repaving material should be changed (in line with the Superintendence of Cultural Heritage's request), the specifications of a substantial number of Luminaries(sic) (Luminaries (sic) Type B, I, R1) will be changed whilst others will be updated and the tender will be split into two as this would be more financially and economically viable.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will consider Appellant's grievances, as follows:

Letters of cancellation of 5th October 2021 & 16th October 2021:

- a) The letter issued by the Contracting Authority on the 5th October 2021 includes no addressee, no information as to the possible dates of filing of an appeal and of the deposit that should accompany the appeal as per the Public Procurement Regulations or of the reason for cancellation. Hence, this Board deems this letter to be null and void on all these grounds.
- b) The official 'Cancellation Notice' by the Contracting Authority was issued on the 16th October 2021 and includes all the details as required by the PPR. Hence, it is this letter that should be used when confirming or otherwise the validity of the appeal as brought forward by Mr Richard Cauchi. The Letter of Objection was filed with the PCR on the 25th October 2021, therefore it is deemed valid as per Regulation 271 of the PPR.

Luminaires:

The Board makes reference to the testimony under oath of Ing Christian Cordina (Technical Expert to the Contracting Authority engaged post evaluation) whereby:

- a) Initially it was stated by Ing Cordina that he was engaged in the first or second week of November.
- b) He had passed on his official comments to the Council only on the 30th November 2021.
- c) He is not an electrical engineer but specialises as a mechanical engineer.
- d) His report is officially dated 1st December 2021 (after the date of the cancellation notice).
- e) His report indicates that the Appellant's offer was non-compliant with regards to 3 types of luminaires, being Type B, Type I and Type R1.
- f) Finally, he re-stated that he was approached by the Council earlier than November.

The Board makes reference to the testimony under oath of Architect Brian Curmi (Member of the Evaluation Committee) whereby:

- a) The luminaires offered were not exactly as requested but similar to those offered by other bidders.
- b) After the evaluation process concluded he had no further communications with the Council except for one meeting.

The Board makes reference to the testimony under oath of Ing Jeffrey Muscat (Member of the Evaluation Committee) whereby:

- a) His specialisation is as an Electrical Engineer
- b) His professional opinion was that the Appellant's offer of luminaires of Type I and Type R1 were compliant.
- c) With regards to Type B, it was also deemed compliant since the requirements of IP68 and IK10 were not deemed relevant. IP 68 is used when the luminaire is to be used under water for more than 1 metre, which is not the case in point. Regarding IK08, he noted that it is his professional opinion that IK10 is not necessary in such circumstances.

After analysing these 3 testimonies and relevant documentation, this Board notes:

- a) It is inconceivable how the Contracting Authority appointed a mechanical engineer (Ing Christian Cordina) post evaluation stage and 'apparently' post Cancellation Notice stage to advise on the Luminaires when in the Evaluation Committee there was an Engineer who specialises as an Electrical Engineer. Their professional opinion, as per above, differs. This Board opines that since Ing Muscat is specialised as an Electrical Engineer and Ing Cordina's report postdates the Cancellation Notice, that it will disregard Ing Cordina's report and rests on the technical evaluation of Ing Muscat. As a matter of interest Eng Cordina is listed by the Sannat Council as their Engineer.
- a) Ing Muscat notes that Luminaires Type I and Type R1 were deemed to be compliant.
- b) With regards to Luminaire Type B, it was deemed that 'Ingress Protection' of IP68 is used and more suitable to submersible luminaires, which is not the case in point, hence IP67 was not only deemed sufficient, but as per Ing Muscat's testimony, would make much more sense as it would require less maintenance. Also, in relation to the 'Impact Resistance', bidder confirmed compliance in the details supplied through a clarification.

Therefore, this Board, when taking into consideration the concept of proportionality, and all other aspects noted above, agrees with the finding and conclusions of the Evaluation Committee, and does not uphold the arguments of the Contracting Authority brought forward with the report of Ing Christian Cordina.

Gantt Chart:

The Board makes reference to the testimony under oath of Ing Jeffrey Muscat (Member of the Evaluation Committee) whereby:

- a) On first evaluation the technical offer form indicated 94 weeks but bidder indicated that completion would be in 78 weeks - if the chart was worked on a six day week the time would actually work out at 78 weeks. This was confirmed in a clarification.

After analysing this testimony and relevant documentation, this Board notes that:

- a) The Tender Document – Section 2 – Paragraph 15.1 states: *“The Contractor shall submit a revised Gantt Chart (Plan of Works) to cover the entire period of Performance stipulated in Article 32 of these conditions. This shall be provided by the Contractor within 10 (ten) calendar days from the signing of Contract.”*

Therefore, this Board, after noting that the Gantt chart timeline issue was duly clarified by the recommended bidder, now appellant, and the tender dossier clearly states in Section 2 – Paragraph 15.1, that a revised plan of works is to be submitted within 10 calendar days from the signing of the contract, finds compliance on the part of the Appellant.

Change in Materials:

The Board makes reference to the testimony under oath of Architect Edward Scerri (Technical Expert to the Contracting Authority) and listed by the Sannat Council as their Architect whereby:

- a) It was stated *“After the award of the tender he was requested by the Heritage Superintendent to consider if the type of materials being used were suitable”*
- b) He does not recall the date of this request
- c) It was stated *“This intervention had the effect of delaying the tender as it was uncertain whether the materials would be approved.”*
- d) It was stated *“A possible change of materials would again likely lead to a change in execution.”*

The Board also notes that the letter from the Superintendent of Cultural Heritage is dated a week after the withdrawal of the award.

When considering the above, especially the testimony of Architect Scerri, he confirmed that the change is “a possible change”, therefore not a certainty.

The Board opines, that such a lack of clarity is certainly not enough to ascertain that the economic or technical parameters of the project have been fundamentally altered.

When considering all the above main points, this Board upholds the Appellant’s grievances.

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) To uphold the Appellant's concerns and grievances;
- b) To cancel the Letter dated 5th October 2021 issued by the Contracting Authority showing no addressee with subject matter being "Works – Tender for the Repaving and Embellishment of Pjazza Santa Margerita ta Sannat";
- c) To cancel the Cancellation Notice Letter issued by the Contracting Authority dated 16th October 2021;
- d) To accede to the appeal. After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.
- e) Regrets and deplors the lax way the award of this tender was handled by the Contracting Authority.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Dr Charles Cassar
Member